

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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IN THE MATTER OF )  
 )  
RENZENBERGER, INC., )  
Employer )  
 )  
and )  
 )  
UNITED ELECTRICAL, RADIO AND )  
MACHINE WORKERS OF AMERICA (UE), )  
LOCAL 1177 )  
Petitioner )  
 )  
and )  
 )  
TRUCK DRIVERS, CHAUFFEURS, )  
WAREHOUSEMEN & HELPERS UNION, )  
LOCAL 707 )  
Intervener )  
\_\_\_\_\_ )

Case No: 13-RC-145377

**BRIEF IN SUPPORT OF EXCEPTIONS ON BEHALF OF PETITIONER UNITED  
ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1177  
TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON  
CHALLENGED BALLOTS**

June 17, 2015

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## **I. PRELIMINARY STATEMENT**

Pursuant to a petition filed on January 29, 2015, and a Stipulated Election Agreement approved on February 9, 2015, a mail ballot election was conducted in the above-captioned matter. The payroll eligibility date for the election was January 24, 2015. Ballots were mailed out on February 27, 2015 and were to be returned to the Regional Office by March 13, 2015. The ballots were counted on March 17, 2015. The stipulated bargaining unit is as follows:

All full-time and regular part-time yard drivers, road drivers, and radius drivers employed by the Employer at or out of Barr Yard currently located at 13600 South Halsted St., Riverdale, IL and the CSX Intermodal Yard located at 59th St. and Western Ave., Chicago, IL; but excluding all other employees, office clerical employees and guards, professional employees and supervisors as defined in the National Labor Relations Act.

(E-5.)<sup>1</sup>

At the count, Renzenberger, Inc. (hereinafter “the Employer”) challenged eleven ballots and the Petitioner challenged four ballots. On April 7, 2015, after a preliminary investigation, the Regional Director issued a Notice of Hearing on Challenged Ballots based upon his conclusion that the challenged ballots raised substantial material and factual issues best resolved by a hearing. Accordingly, a hearing was held on April 22 and 23, 2015, in Chicago, Illinois, before Hearing Officer Jay B. Greenhill (hereinafter “Hearing Officer”).<sup>2</sup> On June 3, 2015, the Hearing Officer issued his Report and Recommendations on Challenged Ballots in which he recommended that the challenged ballots of William Bond, Carol Hillsman, Samuel Washington and Rosie Lowe be opened and counted and that the challenges to the ballots of Michael Davis and Rhonda Shaw be sustained.

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<sup>1</sup> “E-5” refers to Employer’s Exhibit 5 in the record.

<sup>2</sup> Prior to the April 7, 2015 issuance of the Notice of Hearing on Challenged Ballots, the parties agreed that nine voters—Evan Blackamore, Walter Carlson, Michael Hendricks, Felicia Jones, Jerome Morris, Theophilus Pipkins, Willis Roberson, Evan Robinson and Robert Wallace—are not eligible to vote and that their ballots should not be counted. During the hearing, the parties also stipulated that these nine voters are not eligible to vote and that their ballots should not be counted.

With regard to the challenged ballot of Samuel Washington, the Hearing Officer found that Mr. Washington performs both driving and dispatching work for the Employer but because the majority of his time is spent driving he is in the stipulated unit and eligible to vote. (HOR, pg. 12-14.)<sup>3</sup> Thus, the Hearing Officer relied on community of interest principles to find that Mr. Washington should be included in the stipulated unit and ignored the rule in *Bell Convalescent Hospital*, 337 NLRB 191 (2001), which states that where stipulated unit descriptions clearly and unambiguously include a list of job classifications and exclude “all other employees,” classifications not specifically listed are excluded. (HOR, pg. 13-14.) Indeed, the Hearing Officer disregarded testimony from Mr. Washington that his job classification is “relief dispatcher,” which classification was not specifically listed in the stipulated unit and therefore is excluded. *See id.* As such, the Union now respectfully requests that the Board grant its Exceptions for the following reasons.

## **II. DISCUSSION**

Under current Board law, employees with job classifications not specifically included in stipulated unit descriptions that include a list of classifications and exclude “all other employees” are excluded from the stipulated unit and are not eligible to vote. *Bell Convalescent Hospital*, 337 NLRB 191 (2001). In *Bell Convalescent Hospital*, a union and employer stipulated for a unit that included a list of classifications and excluded “all other employees” not specifically included in the stipulated unit. 337 NLRB at 191. The union challenged the ballot of an employee who had a classification which was not listed among the specific inclusions in the stipulated bargaining unit description, arguing that the employee therefore fell within the explicit unit exclusion of “all other employees.” *Id.* The Board sustained the union’s challenge,

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<sup>3</sup> “HOR, pg. 12-14” refers to the Hearing Officer’s Report and Recommendations on Challenged Ballots. Similar notation is used throughout this document.

reasoning that the unit was described in clear, unambiguous terms that did not include the disputed classification and held that the hearing officer improperly applied community of interest principles to find that the employee should be included in the unit. *Id.*

The *Bell Convalescent Hospital* Board further noted,

[i]f the objective intent of the parties concerning the questioned portion of the unit description is expressed in clear and unambiguous terms, the Board will hold the parties to their agreement. In order to determine whether the stipulation is clear or ambiguous, the Board will compare the express language of the stipulated bargaining unit with the disputed classifications. The Board will find a clear intent to include those classifications that match the express language, and will find a clear intent to exclude those classifications not matching the stipulated bargaining unit description.

337 NLRB at 191 (citing *Viacom Cablevision*, 268 NLRB 633 (1984) (internal citations omitted)). As such, “under this view, if the classification is not included, and there is an exclusion for “all other employees,” the stipulation will be read to clearly exclude that classification.” *Id.* (citing *National Public Radio, Inc.*, 328 NLRB 75 (1999); *Prudential Insurance Co.*, 246 NLRB 547 (1979)).

In this case, on February 9, 2015 the Regional Director approved a Stipulated Election Agreement that by its plain terms includes “yard drivers, road drivers and radius drivers” and excludes “all other employees.” By this clear, unambiguous language “dispatchers” are excluded from the unit. *Bell Convalescent Hospital*, 337 NLRB at 191. Similarly, “relief dispatcher,” (which Mr. Washington testified is his job classification (Tr., pg. 289))<sup>4</sup> was not specifically included in the stipulated unit and therefore is excluded. *Id.*

“Dispatcher” clearly is a distinct classification from “driver”. (P-8; P-12; P-13; Tr., pg. 184.)<sup>5</sup> Dispatchers work eight-hour shifts dispatching drivers from the Employer’s office whereas drivers work twelve-hour shifts transporting rail crews in vans. (Tr., pg. 269.)

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<sup>4</sup> “Tr., pg. 289” refers to the hearing transcript, page 289.

<sup>5</sup> “P-8” refers to Petitioner’s Exhibit 8 in the record. Similar notation is used throughout this document.

Dispatchers do not perform van inspections, which are required of drivers. (Tr., pg. 298.)

Dispatchers are paid at a higher rate than drivers and require specialized training to perform their job duties. (P-14a; Tr., pg. 272, 276, 312, 350.) “Dispatcher” is coded as department H67 whereas “driver” is coded as B65 in the Employer’s records. (Tr., pg. 331.)<sup>6</sup>

It is undisputed that Mr. Washington is a dispatcher. Mr. Washington works a regularly scheduled shift as a dispatcher on Saturdays from 4:00 PM to 12:00 AM. (Tr., pg. 288.) Mr. Washington also has trained other employees to be dispatchers for which he received a pay bonus.<sup>7</sup> (P-10; Tr., pg. 284, 351-352.) Mr. Washington always is paid at the dispatcher rate, even when he performs driving duties. (P-10, P-11.) Moreover, Mr. Washington testified that he is classified as a “relief dispatcher” and picks up additional dispatch shifts as needed by the Employer. (Tr., pg. 289.)

In recommending that the Petitioner’s challenge to the ballot of Samuel Washington be overruled and that his ballot be opened and counted, the Hearing Officer limited his analysis to whether Mr. Washington had a community of interest with the petitioned-for unit under the Board’s dual-function employee doctrine. *See Columbia College*, 346 NLRB 726 (2006); *Berea Publishing Co.*, 140 NLRB 516, 519 (1963). Indeed, the Hearing Officer completely disregarded current Board law on voter eligibility under stipulated election agreements that include a list of classifications and exclude “all other employees.” *Bell Convalescent Hospital*, 337 NLRB at 191. Because the language of the stipulated unit description is clear and unambiguous, the Hearing Officer should not have relied on community of interest principles to determine that Mr.

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<sup>6</sup> Dispatchers also “log in” drivers to the system if the PeopleNet system inside the van is not functioning properly, which happens frequently. (Tr., pg. 328, 345.) Drivers must be “logged in” to be paid. (Tr., pg. 330, 345-346.) When Mr. Washington works as a dispatcher, he changes his department from B65 (driver) to H67 (dispatcher) in the Employer’s computer system. (Tr., pg. 331.) There is no record evidence that drivers have the ability to log themselves in if their van’s PeopleNet system is disabled.

<sup>7</sup> Mr. Washington also has performed work as an OJT trainer. (P-16.)

Washington should be included in the stipulated unit. *Id.* As such, like the Board in *Bell Convalescent Hospital*, in this case the Board should hold that Mr. Washington is ineligible to vote because he is a “relief dispatcher” and/or a “dispatcher”, which job classifications were not included in the stipulated unit description and thus are excluded.

### **III. CONCLUSION**

Petitioner United Electrical, Radio and Machine Workers of America (UE), Local 1177, respectfully submits that the record evidence and arguments set forth above directly contradict the Hearing Officer’s Report and Recommendations on Challenged Ballots insofar as he ordered that the ballot of Samuel Washington be opened and counted. As such, the Petitioner respectfully urges the Board to grant its Exception, overrule the Hearing Officer and order that the Petitioner’s challenge to the ballot of Samuel Washington be sustained.

Dated at Pittsburgh, Pennsylvania, this 17th day of June, 2015.

Respectfully submitted,

/s/ Margot Nikitas

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## **CERTIFICATE OF SERVICE**

I certify that a true and correct copy of the foregoing BRIEF IN SUPPORT OF EXCEPTIONS ON BEHALF OF PETITIONER UNITED ELECTRICAL, RADIO, AND MACHINE WORKERS OF AMERICA (UE), LOCAL 1177 TO THE HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS has been sent this 17th day of June, 2015, by email to Scott Gore, Counsel for the Employer, at [sgore@lanermuchin.com](mailto:sgore@lanermuchin.com); Shawn Ford, Counsel for the Employer, at [shawn.ford@renzenberger.com](mailto:shawn.ford@renzenberger.com); Patrick Calihan, Counsel for the Intervener, at [pcalihan@sbcglobal.net](mailto:pcalihan@sbcglobal.net); and Peter Sung Ohr, Regional Director of NLRB Region 13, via e-filing at [www.nlrb.gov](http://www.nlrb.gov).

/s/ Margot Nikitas